FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-206

JACOB J. PARKER, *Et Al*,

Appellants,

v.

HOWARD B. LEVY

On Appeal From the United States Court of Appeals
For the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEE

Pursuant to Rule 42 (3) of this Court, the undersigned moves the Court to grant leave to Richard G. Augenblick to file the attached brief *amicus curiae* in *Parker v. Levy*, (No. 73-206) and *Secretary of the Navy v. Avrech*, (No. 72-1713), both pending before this Court.[1] Augenblick's interest in *Levy* and *Avrech* arises from the fact that he, too, was convicted of a violation of the General Article, Section 134 of the Uniform Code of Military Justice (10 U.S.C. 934). The question of law raised by the Augenblick court martial which would not otherwise be heard or briefed in these proceedings arises from the fact that

[1] Consent to this filing has been declined by the Government.

Augenblick (unlike both Levy and Avrech) was not charged with a violation of Article 134, nor was he tried for any such violation. The General Article first appeared in his prosecution after the close of all evidence and the completion of summations when the Law Officer, over Augenblick's objection, instructed the Navy court that it could find Augenblick guilty of a violation of Article 134 as a "lesser included charge" within Article 125 (Sodomy), of which he was charged and for which he was tried. The Navy court then proceeded to acquit Augenblick under Article 125 and to convict him under Article 134.

The relevance to *Avrech* and *Levy* of the procedure just described is that the use of the General Article as a "lesser included charge" within a wholly different substantive provision graphically illuminates the question of notice to the Defendant which pervades both *Levy* and *Avrech*. This is clear from the position of the Government on this question: notice to servicemen of conduct proscribed by Article 134 and the hidden presence of the Article as a "lesser included charge" is equated and urged in much the same terms in *Avrech*, *Levy* and in *Augenblick*.

Moreover, the Brief which Augenblick seeks to file meets the Government head on by accepting the Government's definition of the constitutional issue before the Court, viz. the constitutionality of the application of the General Article to these Defendants (rather than the constitutionality of the provision on its face). The arguments made in it dealing with notice, ability to defend, proof and vagueness in prosecutions under Article 134 all go to this issue. These arguments appear to be relevant to the Court's deliberations in the event the Court accepts this definition of the issue before it, and should therefore be of assistance to the Court. This is especially so since the Respondents

appear to have defined the issue differently below (viz., the constitutionality of the provision on its face) and it is likely, therefore, that their briefs will not join issue with the Government, nor brief the various points concerning an unconstitutional application of this provision.

Finally, the position taken by the Government makes it clear that if this Court sanctions the use of the General Article in *Levy* and *Avrech*, this sanction will be used by the military authorities for repetitions of the procedure used in *Augenblick*. The arguments of the Government in support of the constitutionality of the General Article when charged and when not charged have been essentially the same ones. It thus seems prudent for the Court to have before it a full briefing of the issues in *Augenblick*, so that it can determine for itself the ramifications of its decision in *Avrech* and *Levy*.

An examination of Article 134 by the Supreme Court is long overdue. In its deliberations in this benchmark case in an area hitherto almost totally unexplored by Article III courts, the Court may find comprehensive briefing on all the issues, historial and legal, of assistance. Recognizing that there are facts in *Augenblick* which differ from those in *Avrech* and *Levy* (which, as the Brief itself points out in some detail, do not dilute the relevance of this briefing to *Avrech* and *Levy*), the Court can certainly derive the benefit that may flow from this briefing and at the same time make its own judgments regarding these factual distinctions.

For these reasons, the Undersigned respectfully prays the Court to grant leave for the filing of the attached brief *amicus curiae* in *Levy* and *Avrech*.

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BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEE

INTRODUCTION

This Brief is filed *Amicus Curiae* in *Parker v. Levy* (No. 73-206) and *Secretary of the Navy v. Avrech* (No. 72-1713), both pending now before this Court because it raises a related question most relevant to the issues before the Court in those cases. That question is: Whether a military Defendant who is not charged with a violation of Article 134 (UCMJ), and whose trial on a wholly differ-

ent charge proceeded through the close of all evidence and summations before Article 134 was first asserted by the military authorities at the close of trial, can nonetheless be convicted of a violation of Article 134 as a "lesser included charge" within the charge asserted against the military Defendant for which the Defendant was tried and acquitted. Viewed alongside either the Government's definition of the key issue in *Avrech* and *Levy* (a test of Article 134's application to *Avrech* and *Levy*), or as Respondents both have urged below (a test of the Article's constitutionality on its face), the use of Article 134 as a "lesser included charge" within a very different substantive provision graphically illuminates the question of notice to the Defendant which so pervades both *Avrech* and *Levy*.

In addition, the facts and outcome of the *Augenblick* court-martial raise two other issues which are most relevant to the disposition of *Avrech* and *Levy*, no matter which view of the case the Court adopts. Those two issues are: (1) *Proof*, i.e., what must be proved by the prosecution under Article 134, and (2) *Vagueness*, as that term applies to the wholly subjective deliberation permitted the guilt-finding military court. It is submitted that the latter problem is a very different one from vagueness within the context of notice to a charged defendant.

Whereas the Government and the Respondents have defined the issue before the Court differently and consequently have, in all likelihood, briefed it differently, this brief meets the Government head on, accepts the Government's definition of its constitutional controversy before the Court and direct its arguments to the essence of the Government position. In establishing the unconstitutionality of Article 134 as applied to these military defendants, this brief should be of aid to the Court in its deliberations on this issue.

For these reasons, the facts of *Augenblick* and the briefing in connection therewith supplied herein are relevant to and, we submit, of assistance to the Court in its deliberations in *Avrech* and *Levy*.

STATUTES INVOLVED

Article 134 (10 U.S.C. 934) of the Uniform Code of Military Justice provides:

> "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the Armed Forces, all conduct of a nature to bring discredit upon the Armed Forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of the Court."

Article 125 of the Uniform Code of Military Justice (10 U.S.C. 925) provides:

> "(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct."

Article 80 of the Uniform Code of Military Justice (10 U.S.C. 880) provides:

> "(a) An act, done with specific intent to commit an offense under this code, amounting to more than mere preparation and tending but failing to effect its commission, is an attempt to commit that offense.
>
> (b) Any person subject to this code who attempts to commit any offense punishable by this code shall be punished as a court-martial may direct, unless otherwise specifically prescribed.
>
> (c) Any person subject to this code may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated."

Article 79 of the Uniform Code of Military Justice (10 U.S.C. 879) provides:

> "An accused may be found guilty of an offense necessarily included in the offense charged or an attempt to commit either the offense charged or an offense necessarily included therein."

QUESTION PRESENTED

Can Article 134 of the Uniform Code of Military Justice be constitutionally used to convict a military defendant not charged or tried for violation of that Article, when the Article is used as a "lesser included charge" within a different substantive provision of the Code under which the Defendant was charged and acquitted?

STATEMENT OF THE CASE

Augenblick was charged and tried for a violation of Article 125 (UCMJ) (App. A-1[1]). He was never charged under Article 134; therein lies the major difference between *Augenblick* on the one hand, and *Avrech* and *Levy* on the other. Both Avrech and Levy were charged under Article 134. Avrech was also charged (and convicted) under Article 80 (quoted above) for the attempt to commit the offense charged under Article 134. Levy was also charged (and convicted) under Article 133 (10 U.S.C. § 933) – ("conduct unbecoming an officer and gentleman") and Article 90 (10 U.S.C. § 890) – ("willful disobedience of a valid order"). This Brief will discuss only the Article 134 issue. In the Augenblick court-martial, the General Article first appeared after the close of all evidence when both sides had rested.[2] The Law Officer, then, over the objections of Augenblick's trial Counsel, instructed the Court that it could find Augenblick guilty of a violation of Article 134 as a "lesser included charge" within Article 125.[3] The court-martial then acquitted Augenblick of the charge under Article 125 but found him guilty of the newly offered charge under Article 134.[4,5]

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[1] The portions of the record before the Navy court-martial referred to are attached to this brief as Appendix A.

[2] App. A-2, App. A-4.

[3] App. A-5.

[4] App. A-1.

[5] Because this case has been before this Court before, it is appropriate to record the procedural history in it since its first appearance here, and this is done in the photostats of the docket entries

[cont'd]

SUMMARY OF ARGUMENT

I:

The history of Article 134 in civilian courts is a tabela rasa. References to the Article by civilian courts in the past occurred in holdings that civilian courts held no jurisdiction to review military matters, a conclusion no longer true.

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[5] [Cont'd]
in this Court and in the Court of Claims attached to this brief as Appendix B.

In its first appearance, this Court determined that the violation of the Jencks Act during his prosecution asserted by Augenblick did not fall within the jurisdiction of review by the Court of Claims because Jencks Act rights are granted by statute whereas Court of Claims review of military convictions is traditionally restricted to deprivation of constitutional right. *Augenblick v. U.S.*, 393 (1969), rendered on January 14, 1969.

Special note should be taken of the following docket entries attached in Appendix B reflecting proceedings here and in the Court of Claims since then:

(1) The entry of October 24, 1969 in this Court, extending the time for filing of a response by the Government to Augenblick's petition for certiorari (on file with this Court since September 2, 1969) until Augenblick filed another petition for certiorari to review action of the Court of Claims upon his Motion in that Court of July 14, 1969. His Motion of July 14, 1969 sought leave to place before the Court of Claims the same arguments raised herein: the unconstitutionality of the use of Article 134 as a "lesser included crime".

(2) In the Court of Claims docket: the entries of June 14, 1971, December 17, 1971, April 28, 1972, August 17, 1973, September 24, 1973 and October 3, 1973 reflect the procedural impasse in which this case has become ensnarled. On June 14,

II:

The use of the General Article in *Augenblick* illustrates in graphic detail the constitutional injury inherent in its

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[5][Cont'd]
1971 the Court of Claims ordered full briefing of this cause, citing specific issues it wished argued, including specifically the Article 134 issue. Three briefs were filed pursuant to that order. In the December 17, 1971 order, the cause was ordered to be placed on the calendar for oral argument. On April 11, 1972 the Clerk of that Court wrote the undersigned that the cause had been removed from the oral argument calendar. In his April 28, 1972 Motion, Augenblick sought again to place the case on the calendar for argument so that a decision in it could be reached. This motion was denied by that Court on May 5 without prejudice to its being renewed. On July 3, 1973, Augenblick moved for the second time to have the case placed on the calendar for argument so that it could reach decision. On August 17, 1973 the Motion was granted and further briefing requested so that the Court could be informed on intervening developments on the issues (including the Article 134 controversy) since its first briefing in 1971. Three additional briefs were filed by the parties citing, inter alia, the probable pendency of *Avrech* and *Levy* in this Court. On September 24, 1973, that Court again entered an order removing the cause from the calendar for oral argument. Augenblick's Motion for Reconsideration of this Court's Order of September 24, 1973, (seeking, again, disposition of the cause) was never acted on.

Augenblick makes no complaint regarding the procedures in either court. But what has manifestly occurred is the entry of a stay of proceedings in this Court pending adjudication of the Article 134 issue in the Court of Claims and a determination in that Court (following three efforts by Augenblick to secure a decision in the case from that Court and two moves by that Court to go forward to decision only to have the Court reverse itself both times) to stay proceedings in that Court awaiting action by the Supreme Court on the Article 134 issues. Thus the Article 134 issue raised by Augenblick in both courts in 1969 has been tied in this impasse between Courts, and has not reached decision in the time since.

use today. This injury occurs as fully in *Avrech* and *Levy* as it does in *Augenblick*.

Augenblick was constitutionally deprived because:

(A) He was not on notice that the conduct for which he was convicted was punishable under Article 134;

(B) At court-martial, he had no opportunity to defend himself against a charge of violating Article 134;

(C) No attempt was made by the Navy to offer any proof on essential elements of Article 134;

((D) The Navy Court permitted to asess guilt under Article 134 entirely subjectively, with no objective standards put down by the Law Officer by which the Court could measure the guilt or innocence of the Defendant.

Each of these invasions of constitutional right, in varying degrees, is relevant to that in *Avrech* and *Levy*.

ARGUMENT

I.

The history of Article 134 in civilian courts is a tabela rasa. References to the Article by civilian courts in the past occurred in holdings that civilian courts held no jurisdiction to review military matters, a conclusion no longer true.

Some form of the General Article has been present in military justice in this country since Independence. Applying separately to officers and enlisted men, these provisions were revised in 1806, rearranged and newly numbered in 1874, and then became Article 95 and 96 in the most recent version of the Articles of War signed by President Wilson in 1916. When the Uniform Code of Military Justice was enacted in 1949, 134 drew most of its language from the Army version, but the old Navy and Marine Corps General Article did not vary in substance from the New General Article. There is a separate body of lore forming the history of Section 133's "conduct unbecoming an officer". We are concerned here, however, with the impact of the equally broad, equally vague provisions of Section 134.

With the slow dawning of constitutional review of military convictions in the first half of this century, Section 134 became an obvious target. Its language is offensive to any civilian lawyer bred to notions of objective standards for criminal conduct. The attack on Section 134 has generally been along these lines: the phrases that form the gravamen of any accusation under the section under the section are necessarily so vague that the objectivity and precision so essential to due process are missing. Military courts, however, have always sustained the section against these attacks.

At the end of the 19th century there was a forty-five year period in which the General Article received some scrutiny from the civilian courts. But, with the exception of one case in 1871, this civilian scrutiny was limited to inquiry into the jurisdiction of the military court that had convicted under the General Article. And, in 19th century (and 1902) terms, this inquiry was restricted to finding whether the military court had jurisdiction over the person of the defendant and adhered to its own procedures.

The earliest of these cases, *Dynes v. Hoover,* 20 How. 65, in 1875, found Dynes suing the warden of the District of Columbia penitentiary for false imprisonment because the defendant was imprisoned for attempting to desert the Navy and found guilty under the General Article. Recourse to the General Article was necessary because his attempt had failed and he could not be convicted of desertion. Following a discussion of the General Article, the court proceeded to hold:

> "With the sentence of court martials which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them." 20 How. at 82.

In 1886, Smith, a Navy officer engaged in fraud and corruption was charged under the General Article and sought a writ of prohibition against his prosecution. Again the Article is discussed but the holding of the Court in *Smith v. Whitney,* 116 U.S. 167 (1886) is entirely jurisdictional – 19th century style:

> "This" (issue the Writ of Prohibition) "we are not prepared to do, being clearly of opinion that said conduct of a naval officer is a case arising in the naval forces, and therefore punishable by court martial in the exercise of the powers conferred upon it by the Constitution, to provide and maintain a Navy, and to make rules for the government and regulation of the land and naval forces, without indictment or trial by jury." 116 U.S. at 186.

The miscroscopic jurisdictional dimensions of civilian review of courts martial in those days is easily seen in the next instance in which the General Article arose. One Fletcher, an officer, did not pay his debts in 1872. Brought before the military authorities under the General Article, the Supreme Court was brief in disposing of his attempt at civilian review of his conviction under the General Article:

> "As the Court Martial had jurisdiction, errors in its exercise, if any, cannot be required in this proceeding." *United States v. Fletcher*, 148 U.S. 84, 92 (1893)

Dynes v. Hoover and *Smith v. Whitney* were the example of this severe limitation on civilian judicial inquiry cited to support the summary rejection of Fletcher's argument. The result was no different three years later in *Swaim v. United States*, 156 U.S. 555 (1896). Swaim, after his conviction under the General Article for fraud, went to the Court of Claims for review. He was rejected there. On review the Supreme Court paid lip service to the peculiar nature of military justice and the place within it of the General Article. But the Supreme Court took pains to fix its *holding* within the narrow jurisdictional

perimeter which confined the 19th century Article III Courts when dealing with military justice.

> "As we have reached the conclusion that the court martial in question was duly convened and organized, and that the question decided was within the lawful scope of action, it would be out of place for us to express any opinion on the propriety of the action of the Court in its proceeding and sentence. If, indeed, as has been streneously argued, the appellant was harshly dealt with, and a sentence of undue severity was finally imposed, the remedy must be found elsewhere than in the Courts of Law." 156 U.S. at 566.

If there were any doubt that the constitutional adequacy of the General Article escaped testing in the only cases ever brought in civilian courts, the last of the line, *Carter v. McClaughry*, 183 U.S. 365 (1902) dispels the doubt. The Court again simply spun the prayer wheel of deference to military custom. Its ruling could not be clearer:

> "But we must not be understood by anything we have said as intending in the slightest degree to impair the salutary rule that the sentences of court martials, when affirmed by the military tribunal of last resort, cannot be revised by the civil courts save only when void because of an absolute want of power, and not merely voidable because of the defective exercise of power possessed." 183 U.S. at 901.

It is entirely accurate to conclude that the constitutionality of the General Article never generated any

doubt in the Supreme Court of the United States during that prehistoric period (in terms of civilian review of courts martial), because the Supreme Court felt that it had no lawful authority to review matters of military justice. And among those matters which flourished from 1857 to 1902 in the forbidden garden of military jurisprudence, walled off from any civilian inquiry, was the General Article.[6]

But, of course, the walls prohibiting the Federal courts (and especially the Supreme Court) from peering within the military keep have long been opened. Colonel Wiener, in his 1968 article on Section 134[7] views the core problem of constitutionality to be vagueness and openly questions where the decisions voiding civilian statutes for vagueness (which commenced in 1921) leaves the General Article, last viewed by the Supreme Court in 1902.

The problems raised by Section 134 in this case are, however, considerably broader. They can fairly be summarized by placing the General Article alongside contemporary constitutional rules in 1971, now that civilian courts have broken the jurisdictional bonds of 1902 and

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[6] If there is an aberration in the line of hands-off decisions sharply restricting civilian courts from an inquiry into the constitutionality of the General Article, it is an ancient one. On one occasion in 1881, the Supreme Court permitted itself to hold, apparently, that it could go to the merits of the General Article. Mason, a soldier assigned to guard Guiteau, the assassin of Garfield, took a shot at Guiteau while on duty and tried to kill him. In *Ex parte Mason,* 105 U.S. 426, the Court went straight to Mason's breach of discipline and sustained his convinction under that clause of the General Article.

[7] Wiener, *Are the General Military Articles Unconstitutionally Vague?* 54 ABA Journal 357.

can examine this provision and *all* of the constitutional doubts – not only vagueness – that its use throws up. Unlike 1902, in 1971 servicemen have undoubted, extensive constitutional rights and access to the Federal courts to protect them. In 1971, thus, a constitutional test of the General Article is a benchmark case, coming to the civilian court as it does to this court, as a matter of first impression with little or no precedent to bind it.

II.

The use of the General Article in Augenblick illustrates in graphic detail the constitutional injury inherent in its use today. This injury occurs as fully in Avrech and Levy as it does in Augenblick.

Augenblick was constitutionally deprived because: (A) He was not on notice that the conduct for which he was convicted was punishable under Article 134; (B) At court-martial, he had no opportunity to defend himself against a charge of violating Article 134; (C) No attempt was made by the Navy to offer any proof on essential elements of Article 134, and (D) The Navy court was permitted to assess guilt under Article 134 entirely subjectively, with no objective standards put down by the Law Officer by which the Court could measure the guilt or innocence of the Defendant.

Each of these invasions of constitutional right, in varying degrees, is relevant to what occurred in Avrech and Levy.

A. Each of the military Defendants was not on notice that the conduct for which he was convicted was punishable under Article 134.

Assuming that the military defendant is specifically charged under Article 134 (as Levy and Avrech were,

and as Augenblick was not), the problem of vagueness is in no way solved. The Government solves it by contending that the military community is a "specialized society governed by special rules and customs well-known to its members" (Gov. Br. in *Avrech*, 12-18, 27-33). These rules and customs are, apparently, presently engrafted in the Manual for Courts Martial and it is from this Manual that the individual serviceman ostensibly receives notice in advance that certain conduct is proscribed.

There are three major difficulties in this view.

First, servicemen are not convicted of formulations or definitions of crimes set down in a Manual, they are convicted of offenses set out in a *federal statute*. Indeed, it is quite clear that the military authorities could not themselves create military crimes by describing them in the Manual. Neither the Manual's specifications nor the listing of crimes that are set out in its Appendix answer the question of whether the *statute* under which a prosecution under 134 must proceed is clear enough to put the serviceman on notice of what is criminal and what is not.

This is especially true because the appendices that list the offenses ostensibly embraced within the General Article at any time are entirely ambulatory. The Manual Appendix cited by the Government in its brief in *Avrech* (at p. 29) contained 63 different specifications. If the military authorities can expand or contract the scope of Article 134 by additions or deletions to the Manual they are, indeed, supervening the function of the Congress – from whence the authority to convict is derived within the terms set out by the Congress. If the military authorities wish the discretionary power to convict in the disparate and often inconsistent manner that they have under Article 134, let them go to Congres for the power

in specific amendments to the Uniform Code. To permit free-wheeling through a federal criminal code for methods of convicting military defendants beyond the terms of the statute is an affront to fundamental due process.

The notion that servicemen live in a world governed by custom, not law, enforced by authorities who apply this custom as part of accepted military law, is a throwback to the age before enactment of the Uniform Code. Yet the Government urges it in *Avrech* (Gov. Br. 27-54) and it has urged it to the Court of Claims in *Augenblick* (Gov. Br. dated November 11, 1971 filed in *Augenblick v. U.S.*, 357-64). The succinct refutation to this was given by Justice Clark, below, in *Avrech:*

> ". . . the Government says the clear knowledge of Avrech that his actions might lead to a court-martial shows that he had fair warning that Article 134 prohibited his proposed action. The fear, if any, which Avrech had that his action might lead to his court-martial does not demonstrate that he knew his actions were covered by Article 134. Nor does it provide a substitute for the Article's vague and indefinite language *Bouie v. City of Columbia*, 378 U.S. 347 (1964). There the Court found "it irrelevant that petitioners" at one point testified that they had intended to be arrested," since "the record is silent as to what petition intended to be arrested for . . ." Whether a statute afford "fair warning . . . must be made on the basis of the statute itself and the other pertinent law, rather than on an ad hoc appraisal of the subjective expectations of particular defendants." 477 F.2d at 1245

Finally, it must be emphasized that penal law-making by custom has never been sanctioned by an Article III Court in the last 79 years since *Swaim*, supra, or at least in the last 72 years since *Mason*. It is time now for the military authorities to become governed by the advances in military law that have occurred during those years, by this Court's utterances on numerous occasions in recent years that our military personnel have substantial constitutional rights not theretofore recognized, and by the giant step toward enlightened criminal procedures provided by the enactment of the Uniform Code.

B. The Defendant had no opportunity to defend himself at court-martial, the General Article as a "lesser included charge.

The next difficulty arising from the military use of the General Article is demonstrated by the Navy's failure to charge Commander Augenblick of its violation. Section 134 was never mentioned until all evidence was in at his court-martial; he was, in consequence, wholly disabled from defending himself against the charge. Article 134 was first mentioned at the point when the law officer (over the objection of defense counsel) was preparing to instruct the court immediately before the case was submitted to its members for their consideration and verdict. It was made available to the Court as a "lesser included offense" within the charge[8] actually levied against the defendant.[9]

Under those circumstances, Section 134 could not be properly used to convict this defendant. Under these cir-

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[8] Sodomy, Under Article 125, U.C.M.J.; Article 134 *not* charged at the outset, or during the proceeding except at its close.

[9] App. A-1.

cumstances it could not properly constitute a "lesser included offense" of which the defendant had notice required in due process.

The concept of a "lesser included charge" is one that has frequently troubled courts because of the inherent problem of notice to the defendant that he may be convicted of a crime which, at least *in haec verba*, is not charged against him. Civilian courts dealing with this problem have developed simple safeguards against abuse. Rule 31 (c), Federal Rules of Criminal Procedure embodies one such safeguard:

> "The defendant may be found guilty of an offense *necessarily* included in the offense charged or of an attempt to commit either the offense charged or an offense *necessarily* included therein if the attempt is an offense." (Emphasis supplied)

The use of "necessarily" imparts definite standards, both legally and as a matter of factual guarantee that the defendant be given some inkling that hidden beneath the language of his indictment there exist other accusations of which he is in jeopardy. In the many cases where a conviction of a "lesser included offense" is reached, no one could doubt either its validity or the palpable notice given the defendant of the plural charges against him (viz., 2nd degree murder, manslaughter and assault in the 1st degree murder cases; all attempts to commit crimes, where the attempt itself is criminal). The rule has sense and some considerable fairness based on the reasonableness of notice.

Where, however, this notice is less than fair and clear, the civilian courts have balked. Perhaps the most cogent formulation of this is found in *Kelly v. United States*, 370 F.2d 227, a 1966 opinion in the District of Columbia circuit. The defendant, charged with sale-facilitation in the

indictment, asked the court to instruct on the lesser included offense of possession of narcotics. Possession was not included in the indictment, but proof of possession was adduced at trial. The Court held, in language notably applicable to the case at bar:

> "Although the doctrine may also be invoked by defendant, his right to invoke it does not extend beyond the right of the prosecutor. The right of the prosecutor *is limited to the offense of which the defendant has been given notice* by the indictment and the defendant is not subject to conviction for other offenses because of the nature of the proof. What is *controlling is the offense charged in the indictment, not the offense established by the trial proof*, whether it is the prosecutor or the defendant who is seeking extension from the offense charged to another offense as 'necessarily included.'" (Emphasis supplied.) 320 F.2d at 229.

If "notice by the indictment" is the standard in civilian courts, the same rule – at least nominally – applies to the military. The requirement of Article 32 (b) of the Uniform Code (10 U.S.C. 832) that "The accused shall be advised of the charges against him" can be met in no other way.[10] Article 79 of the Uniform Code defines a "lesser included offense" in terms undistinguishable from its civilian counterpart:

> "An accused may be found guilty of an offense necessarily included in the offense charged or an attempt to commit either the offense charged or an offense *necessarily* included therein." (Emphasis supplied.)

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[10] App. C-1.

The test, then, is whether Commander Augenblick had "been given notice" that the conduct finally relied on by the Navy court for its conviction was available to it to convict him, and whether this notice *necessarily* arose from the charge placed against him at the outset.

The only specific information that a serviceman might have of the range of charges not appearing on the face of his indictment but nonetheless available for use by the Court is the notice provided by the Manual for Courts-Martial. Indeed, the prescribed availability of the Manual has been looked to as satisfaction of the notice requirement in *Levy* and *Avrech*. Appendix 12 of the Manual lists "commonly included offenses". The 1951 Manual, which with its 1959 Supplement, was in effect in 1961 when Commander Augenblick's alleged offense and trial took place, lists *no* offenses as included with Article 125. It was not until the issuance of the 1969 Manual that Section 134 was listed as an included offense within Article 125 charge. Thus, the commonest form of notice to all servicement of the multiplicity of offenses he is in peril of, though not charged with, could not be given in Commander Augenblick's case.

The Manual, however, as shown above, is ambulatory and does contain an admonition that it may not be all inclusive. And there *were* military cases prior to 1961 in which military tribunals convicted under 134 as a lesser offense when 125 was charged, *United States v. Jones*, 13 C.M.R. 420 (1953). But this is hardly "notice" adequate to justify use of 134 as a "lesser included offense" under either civilian law or the Uniform Code. It runs directly afoul of Section 79's definition of what a "lesser included crime" may be. To fall within the definition, conduct must *necessarily* be included in the offense charged. The finding of a Court in 1953 that certain acts of un-sodomy

or near-sodomy constituted a violation of Article 134 cannot constitute notice that other acts among the indefinite combinations and permutations of sexual irregularities will *necessarily* violate 134.

The basic problem with any serviceman – or his lawyer – inferring from a charge under 125 that 134 is in the wings, and may be brought out at the close of trial *is that two elements of criminal conduct must be established for guilt under 134 which are not present in 125.* Physical conduct must be shown – under 134 – but this conduct is only the first of the elements of the offense. "Prejudice to good order and discipline" or "discredit to the Armed Forces" resulting directly from this conduct must also be established. Neither of these elements is present in Section 125. Accordingly, a finding by a 1952 court that these elements might have been present in the circumstances of the 1952 prosecution for sodomy is no notice that different conduct, under different circumstances, would be similarly embraced by a sodomy persecution.

And, indeed, how could Section 134, which contains two elements entirely missing from Section 125 even be "necessarily included" within Section 125? Prosecutions under the latter do not touch on the impact of the offense, either on the accused's station, his service or his service's reputation. Unless Section 134 is to be judicially amended to do away with two of the elements it can never be necessarily included within 125. It is a literal impossibility, therefore, for any serviceman, or his lawyer, to be charged with notice that Section 134 may loom out of the closing hours of his sodomy trial to assist the prosecution when the prosecution finds itself unable to prove the charge before it.[11]

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[11] If a Navy prosecution can find refuge in Section 134 whenever it finds itself in difficulty in proving a sodomy charge under

[Cont'd]

Thus, *Augenblick* discloses that the General Article is a moveable feast from which prosecutors may draw sustenance whenever they are in trouble. This is true notwithstanding the reality that involved here is a criminal statute whose inclusion within other must be tested by its own words.

The salient aspect – relevant to *Avrech* and *Levy* – of the Navy's improper use of Article 134 in *Augenblick* is that sanction of the General Article in the cases before the Court will lead inexorably to repetitions of the use of this provision as it was employed in *Augenblick*. If the Article's language is sufficiently specific to put servicemen on notice of proscribed criminal conduct stretching from "abusing a public animal" to "breaking a medical quarantine", it takes no metaphysical powers to extend this special form of specificity to include notice that this array of criminal charges is also available to prosecutors who cannot prove the elements of other substantive crimes and seek out 134 to salvage a conviction. The test of specificity where Article 134 has been charged may differ from where it has not, but the Government apparently does not believe so. It has argued precisely the same "notice by custom" in both *Avrech* and *Augenblick* (in the Court of Claims). It is for

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[11] [Cont'd]
Section 125, the range of charges not appearing on the face of the Section 125 indictment but nonetheless available for use by the prosecution number no less than fifty-eight, extending from "abusing a public animal" through defaulting on debts and "breaking a medical quarantine" to wearing unauthorized insignia (Manual for Courts Martial, 1951, Appendix 6, pp. 488-495). If, somehow, 134 is "necessarily" included within a charge under 125, each and every one of these fifty-eight charges are "necessarily included" and may be used if the proof happens to stray into facts which the prosecution might find useful if it ran into trouble proving its indictment.

this reason that this issue, the use of the General Article as a "lesser included charge" is a graphic demonstration of the mischief inherent in the Article's use, and relevant indeed in the cases before this Court.

C. No attempt was made by the Navy in Augenblick *to offer any proof on essential elements of Article 134; the failure of proof in all of the cases before the Court:*

The second constitutional defect in the use of the General Article in *Augenblick* is that its elements were not proved. The complaint here is not a simple lack of evidence; it is failure of any attempt to prove two elements of a crime.

What is argued here is equally applicable to *Levy* and *Avrech*. Obviously both records differ factually from each other and from *Augenblick*. But common to all three, and a key to the frequent use of the General Article by military prosecutors, is the ignoring of elements of 134 as if they were not really elements of a crime which must be proved before guilt can be pronounced.

What transpired after the law officer made the General Article available to the *Augenblick* court was –abject silence on the question of proof. There is no other way to characterize the conduct of the law officer than to state that he simply assumed that evidence demonstrating prejudice to good order and discipline and discredit to the armed forces was in the record and of sufficient weight to permit the Court to find guilt.

What is this evidence? There was not a word of evidence that went to any point in this case except the physical conduct of the defendant. The impact of the law officer's conduct was an *assumption* that all of this testimony went also to the issues of whether this conduct was prejudicial to good order and discipline and discrediting to the service.

If this assumption was a proper one, the two elements[12] of the General Article here in play would be rendered total surplusage, because evidence of the "disorders and neglects" – the alleged conduct of the defendant – would also *automatically* constitute sufficient evidence under these separate provisions of the Article to get the prosecution to the jury on all elements of a charge under the Article.

Not even the military, itself, takes this position. Aware of the legal warts appearing on the surface of the General Article in contemporary jurisprudence, military tribunals have taken pains to point out that some nexus between the defendant's conduct and the controversial clauses of the General Article must be made out by the prosecution:

> ". . . The General Article is not such a catch-all as to make every irregular, mischievous, or improper act a court-martial offense. Rather, as this Court stated in *United States v. Holiday*, 4 U.S.C.M.A. 454, 16 C.M.R. 28:
>
> ". . . The Article contemplates only the punishment of that type of misconduct which is directly and palpably – as distinguished from indirectly and remotely – prejudicial to good order and discipline." *United States v. Sadinsky*, 14 U.S.C.M.A. 563, 564-565 (1964).

If a direct and palpable connection between conduct and good order and discipline must be shown, some one must show it; to do so, evidence of some kind must be offered by the prosecution probative of this direct relationship. The Manual of Courts Martial repeats this requirement:

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[12] "to the prejudice of good order and discipline"; "conduct of a nature to bring discredit upon the armed forces"

> "An irregular or improper act on the part of a member of the military service can scarcely be conceived which may not be regarded as in some indirect or remote sense prejudicing discipline, but the Article does not contemplate such distant effects and is confined to cases in which the prejudice is reasonably direct and palpable." (para. 213a, Manual for Courts Martial (1951))

No law officer may, therefore, properly make the simple assumption that the "disorder or neglect", (viz., the physical conduct involved) ipso facto and necessarily violates Section 134. The *prejudice to good order and discipline,* as well as the *discredit to the armed forces* must be *proved.*

Moreover, the Manual enumerates the separate elements of proof under Section 134 that form the burden of the prosecution:

> "Para. 213d. The proof required for conviction of an offense under Article 134 depends on the nature of the misconduct charged . . . One element of proof common to every case tried under Article 134, except one tried as a crime or offense not capital, is that the conduct of the accused, under the circumstances, was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. This element is common to all the offenses discussed in 213 (f)[13] and

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[13] Offenses not embraced within 134's "crimes and offenses not capital", the "lesser included offense" herein was given to the Court under 134's other provisions, not under the "crimes and offenses" provision.

should be included in instructions as to the elements of these offenses, *in addition* to their specific elements. Subject to the foregoing, an offense under either of the first two clauses of Article 134 requires the following proof:

(1) That the accused did or failed to do the act, as alleged, *and*

(2) *That under the circumstances his conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.* (Emphasis supplied.)

Manual for Courts Martial, 1969, pp. 28-73.

Clearly, then *proof* of the impact of the defendant's conduct on order and discipline and on the public image of the service is separate from proof of the defendant's conduct itself, and a necessary element for conviction. This requirement of proof cuts across *Augenblick*. It strikes at the sufficiency of evidence of the physical conduct of the defendant, and that evidence alone, on the broad second element of this crime: the impact of this conduct on the defendant's service, and service's reputation. It strikes at the propriety of submitting this case to the trier of fact without a word of proof bearing on the relationship of this conduct to a far broader entity, that of the discipline and order of the post at which the defendant was posted, and its impact (if any) on the Naval establishment generally.

While elements in each of these records differ, there is the common absence of testimony in all three that goes to the point of *impact* of the words and deeds. No presumption in favor of the prosecution can be used here; direct evidence of prejudice to good order and discipline or

direct evidence of discredit to the Armed Forces must be shown – wholly apart from the words and deeds – if they are to be transmitted from private acts or communications into elements of a crime which Congress has defined to be public in nature.

The mischief in permitting the absence of such proof is compounded by the special facts in *Augenblick.* If the prosecution offered not a shred of evidence going to these points in *Augenblick,* the defense, certainly, had no opportunity whatsoever to demonstrate that this defendant's conduct (even if he had performed the "lesser included" lewd and lascivious" act) was private in nature, did not bear on discipline or good order at the time or in this officer's reasonably foreseeable future, and had consequences sufficiently cloistered to preclude any substantial public opprobrium from falling on his service. Yet that is the exercise in proof that the Article and the Manual for Courts Martial require of the prosecution and permit of the defense. But at the point in the procedure when the General Article first surfaced, the prosecution's lapse was simply ignored and it was too late for this effort by the defense.

All evidence was in and the record closed. Thereupon the law officer proceeded to ignore the requirements of proof incumbent on the prosecution on two elements of the charge newly before him. He ignored the manifest foreclosing of defense evidence on these elements. He assumed sufficiency of proof of impact on discipline and order, he assumed sufificiency of proof on discredit, he proceeded oblivious of defendant's right of proof on these same points – and gave the case to the Court.

D. The Navy Court in Augenblick *was permitted to assess guilt under Article 134 entirely subjectively, with no objective standards put down by the Law Officer by which the Court could measure guilt or innocence; the deliberations in* Avrech *and* Levy *were just as subjective.*

At the close of trial of seven days in *Augenblick*, the law officer instructed the court. His instruction under Article 134 is quoted verbatim:

> "If you are satisfied by legal and competent evidence before you beyond a reasonable doubt only, one, that at the time and place alleged and in the manner indicated by the evidence the accused wrongfully committed an indecent, lewd and lascivious act with James O. Hodges, Jr., airman third class, United States Air Force, but which act fell short of sodomy; and, two, that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces, then you may, by exceptions and substitutions to the charge and specification, find the accused guilty of an indecent, lewd and lascivious act as violation of Article 134 of the Code. You will notice that he is charged with a violation of 125 of the Code." (TR VII-369)[14]

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[14] No greater objectivity was provided the *Levy* or the *Avrech* courts. They were instructed very largely by reading the language of 134, as was the *Augenblick* court.

The Court then retired, recalled the law officer to report an acquittal of sodomy but finding of guilt on the lesser included charge. The law officer then assisted the Court in drafting a specification on this charge, which the Court completed and returned. The Court made no comments or reference to Section 134, except to find guilt under it.

The full folly of the assessment of guilt under Article 134 is displayed by the finding of the *Augenblick* court. No inkling is given whether this Defendant was found guilty by the Court of a "disorder . . . to prejudice of good order and discipline" or of "conduct of a nature to bring discredit upon the Armed Forces".[15] Yet guilt under one clause or the other must be found if a conviction under 134 is to have any validity. Thus, the broad brush of vagueness persisted in the *Augenblick* prosecution through the judgment of the Court.

Looking backward to the time when civilian courts were foreclosed from review of any kind over military convictions, this kind of result brought comment from courts which found, even then, the result alien to civilian jurisprudence. These comments were recognitions of the wide spaces in the law that stretched between the jurisprudence common to the Federal courts and that of the military. *Dynes v. Hoover,* supra, in 1857 brought the expression:

> "Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is known by practical men in the Navy and Army, and

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[15] See Appendix A-1.

> by those who have studied the law of the courts martial and the crimes of which the different courts martial have cognizance." (20 How. at 82).

Judge Nott of the Court of Claims, in *United States v. Swaim*, supra, wrote of this peculiar kind of emanation, the General Article, which troubled the jurist in much the way that a barbaric practice of the Chinese might:

> "The cases which involve conduct to the prejudice of good order and military discipline are still further beyond the bounds of ordinary judicial judgment, for they are not measurable by our inate sense of right and wrong, of honor and dishonor, but must be gauged by an actual knowledge or experience of military law, its usage and duties." (28 Ct. Cls. at).

Seventy-nine years ago military justice was a foreign code of conduct entirely unrelated to any form of due process. Judge Nott also made this clear in *Swaim*:

> "When a person enters the military service, whether an officer or private, he surrenders himself to a code of laws and obligations wholly inconsistent with the principles which insure our constitutional rights." (28 Ct. Cls. at 217).

But we are not in the 19th centure of unquestioned military latitude in these matters. The extension of the habeas corpus jurisdiction to the military in the 1940's, the passage of the Uniform Code of Military Justice, and the affirmation in *Burns v. Wilson*, 346 U.S. 137 (1953) that servicemen possess substantial constitutional rights which must be safeguarded by the Federal courts, and, of

course, the directives of *O'Callahan v. Parker*, 395 U.S. 258 (1969), place these utterances of 100 years ago amongst the constitutional antiques that can no longer be accepted without question.

All civilian courts are agreed that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its applicaton, violates the first essential of due process." *Connally v. General Construction Co.*, 269 U.S. 391 (1926). Similarly, all courts agree that:

> "It will not do to hold an average man to the peril of an indictment for the unwise exercise of his . . . knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result." *Cline v. Frink Dairy Co.*, 274 U.S. 445, 465 (1927)'

To all courts, the purpose of these constitutional strictures against vagueness are (1) fair warning to the potential criminal offender (discussed earlier) and (2) standards sufficiently precise to guide the court and the jury in determining whether a crime has been made out.[16]

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[16] See Scott, Constitutional Limitations on Substantive Criminal Law, 29 Rocky Mt. L. Rev. 275 (1957), *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939; *Herndon v. Lowry*, 301 U.S. 242 (1937), among the dozen of contemporary decisions envalidating criminal statutes lacking objective standards for determining guilt; e.g., "Any attempt, by persuasion otherwise to induce others to join in any combined resistance to lawful authority of the state" (*Herndon*, supra, with the Court noting the infinite array of cause

[Cont'd]

Consequently, civilian courts need not and cannot remain aloof in 1971 from the spectacle of seven naval officers left entirely without judicial guidance determining whether an officer charged of an offense abhorrent to the Navy is to remain an officer or is to be stigmatized beyond repair for life. It is far too late in the day, at least thirty years too late insofar as constitutional safeguards are concerned, for military custom, or even "an actual knowledge of experience of military law" to substitute for the rudiments of constitutional protection. These relics among judicial restraints cannot today, some seventy-one years after the last civilian court looked at them, take the place of an objective definition of a crime so stigmatizing that the reputation of a lifetime is forfeited because seven men chance to be morally offended.

Can men of common (or even uncommon) intelligence do anything but guess as to what might "prejudice good order and discipline", since what constitutes this same good order and discipline is totally without judicial or lay definition? One may search the literature of military reports in vain; the concept has no written metes or bounds. It is totally within the mind of the individual enforcer of order and discipline, and therefore infinitely variable.

Can words more capable of an infinity of private definition be found? Can words more given to one meaning in the mores of 1949 and another in the society of 1971,

16 [Cont'd]

and effect relationships covered by the prohibition, holding that "The Law, as thus construed, licenses the jury to create its own standard in each case"); being "known to be a member of any gang consisting of two or more persons" (*Lanzetta*, supra); a ban on films deemed to be "of such character as to be prejudicial to the best interests of the people" (*Gelling v. Texas*, 343 U.S. 960 (1925).

be found? Regional predilections and prejudices, personal distastes either normal or neurotic, private encounters wholly unrelated to military experience, are all set in motion if a man's judgment is to be made guided only by those words. To say they are subjective words is to describe them most moderately. They are more than subjective: they are invitations to the free exercise of whatever private bias the judgment-maker feels most strongly. They are the sole place in the law, civilian or military, when personal whim, caprice and prejudice are beckoned openly to dispose of the essence of a human life.

The Navy used Section 134 in this case to rid itself of Commander Augenblick and disgrace him when more orderly means seemed to fail. The private morality poll conducted by the seven members of the Navy court was light years removed from due process as it is today. The convictiion of Avrech and Levy in the emotion-charged period of the Viet Nam War was, similarly, an evocation of deeply-felt views by the members of those courts, left unguided in the imposition of guilt by statute or instruction.

CONCLUSION

By analyzing what occurred to Commander Augenblick, this brief has attempted to aid the Court in its search to determine whether the General Article is to be treated as are criminal statutes generally, or whether special rules are to be pronounced exempting military punishment from this treatment. By examining notice, the ability to defend at trial, proof and vagueness in prosecutions under Article 134, this brief hopes to point

up the constitutional defects that inhere in this statute's application. All but one (the issue of the "lesser included charge" and its impact on notice and the ability to defend) are common to *Avrech, Levy* and *Augenblick*. That one facet of the military use of 134 renders *Augenblick*, it is submitted, a more extreme example of constitutional abuse than are the cases before the Court. The tragedy of the matter is, however, that if the Court sanctions the use of the General Article found in *Levy* and *Avrech*, the additional constitutional injury found in *Augenblick* is an inevitable concomitant.

For these reasons, this brief urges the Court to affirm the judgments below in both *Levy* and *Avrech*.

Joseph H. Sharlitt
Counsel to Richard G. Augenblick

APPENDIX A

HEADQUARTERS, FIFTH NAVAL DISTRICT
NORFOLK, VIRGINIA

Code 032
5814/1
8 March 1962

A. United States	)	
	)	
v.	)	General Court-Martial
	)	Order No. 3-62
Richard G. AUGENBLICK	)	
Commander	)	
102649/1100	)	
U.S. Navy	)	

Before a general court-martial which convened at the U.S. Naval Station, Washington, D. C., pursuant to an appointing order dated 10 August 1961, was arraigned and tried:

Commander Richard G. AUGENBLICK 102649/1100 U.S. Navy

U.S. Naval Station, Washington, D. C.

CHARGE AND SPECIFICATION

Charge: Violation of the Uniform Code of Military Justice, Article 125

Specification: In that Commander Richard Gerald AUGENBLICK, U.S. Navy, did at West Basin Drive, Washington, D. C., on or about 12 January 1961, commit sodomy with James O. HODGES, Junior, airman third class, U.S. Air Force.

PLEAS

To the charge and the specification: Not guilty

FINDINGS

Of the charge and the specification:	Not guilty of violation of Article 125 but guilty of violation of Article 134, UCMJ. Of the specification of the charge guilty, except the word "sodomy", substituting therefor the words "an indecent, lewd and lascivious act", and by adding at the end of the specification the words, "by willfully and knowingly placing his head in the lap of the said Hodges with his face in close proximity to the exposed penis of the said Hodges, of the excepted word, not guilty; of the substituted words, guilty.

SENTENCE

To be dismissed from the service.

The sentence was adjudged on 13 September 1961. No previous convictions were considered.

B. PRES: Could we ask this question: Is there any approximation of the time that will be involved? We have one little connection.

LC: All right, sir, I would assume that the out of court hearing that we will hold now will last beyond 1400. It will last about twenty-five minutes. I don't anticipate any longer.

PRES: Do you have any idea how long the arguments might take?

LO: I am wondering if it would be convenient to say take an out of court hearing now and then we could remain in recess, even though we might conclude the out of court hearing, until you members make any telephone calls or what have you that you might desire to do. Captain, I don't want any member to feel that I am trying to rush you. You certainly shouldn't sit when you need rest, sleep or food. You should certainly have a completely open and free mind.

PRES: We have just one little problem which a member says he can solve and then we are all set.

LO: Fine. All right, we will recess for an out of court hearing which will be attended by counsel, the accused, the reporter and the law officer. The court will recess.

The court recessed at 1335, 12 September 1961.

The out of court hearing was called to order.

LO: Let the record show that the hour is now 1337, the 12th day of September 1961. This is an out of court hearing in the case of United States against Augenblick. Present are the accused, counsel for both sides, the reporter and the law officer, as well as certain spectators.

Gentlemen, I give you this opportunity first before I give the instructions that I propose to give, to receive any specific requested instructions from you and, of course, to receive any arguments on them. But before I proceed I would like to advise you – before I proceed, to advise you of any proposed instructions I may have, that I would like to inquire first of the Government, what if any lesser included offense does the Government feel might be in issue?

C. TC: I haven't given it any thought, as a matter of fact. I suggest that the lesser included offense may include an indecent or lewd act with another, which is indicated at Instruction 149 in the Law Officer's Manual, and possibly indecent assault, both of which would be offenses under Article 134.

LO: Did you mean "indecent assault", Commander? I believe the only indecent assault would be committed on a female.

TC: Well, then, I will withdraw that.

LO: Very well. Does the defense desire to be heard on what they consider being a possible lesser included offense?

IDC (Mr. Kendrick): We certainly would object to a lesser included offense. The charge is sodomy. We think that the evidence has got to show sodomy or nothing and that this proposed lesser included offense that has been suggested by the law officer is not in any way supported by any evidence. And we come back to the basic premise that it's sodomy or it isn't sodomy. It's guilty or not guilty, as I see it.

LO: I believe that should be correctly stated to include the lesser included offense proposed by the "trial counsel."

IDC (Mr. Kendrick): I am sorry. Who did I say?

TC: "Law officer."

IDC (Mr. Kendrick): Oh, I am sorry.

LO: Gentlemen, these are the tentative instructions that I propose to give, and are as follows: I intend to inform the court that your arguments are not evidence, as I have

before, but it may assist the court; that they will consider only the evidence produced here; that any objections which I have sustained or any time that I have ordered somethis stricken they are to disregard it; that evidence that has been admitted for any limited purpose is considered only for that purpose.

* * * * *

D. A description, I believe, of lips against the penis of another person. If there is mere oral-genital contact without penetration of the organ into the mouth it is not sodomy irrespective of any other consideration. As I have indicated, mere contact is not enough. Penetration is required. However, it is not necessary that an emission occur for the offense of sodomy.

Consent on the part of the alleged victim of sodomy is not an essential element. The offense of sodomy may be committed with or without the victim's consent, or it may be committed by the mutual consent of two persons involved. I believe, under the state of the evidence, that only one lesser included offense may be in issue at this time. However, if during your deliberations you believe that any other lesser included offense may be in issue I ask that you open court, make your feelings known and I will give you further instructions on your inquiry concerning any other lesser included offense. It would be totally improper for you to come forward with a finding of guilty of any lesser included offense on which you had received no instructions whatever. And that lesser included offense, I believe, that may be in issue is that of indecent, lewd or lascivious act with another.

If you are satisfied by legal and competent evidence before you beyond a reasonable doubt only, one, that at the

time and place alleged and in the manner indicated by the evidence the accused wrongfully committed an indecent, lewd and lascivious act with James O. Hodges, Jr., airman third class, United States Air Force but which act fell short of sodomy; and two that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Armed Forces or was of the nature to bring discredit upon the Armed Forces, then you may, by exceptions and substitutions to the charge and specification, find the accused guilty of an indecent, lewd and lascivious act as a violation of Article 134 of the Code. You will notice that he is charged with a violation of 125 of the Code.

* * * * *

APPENDIX B

69-1

DOCKET ENTRIES IN THE SUPREME COURT 39

Richard G. Augenblick, Petitioner,

v.

Title United States

Court	Filing Date	Term & Dkt. No.
United States Court of Claims	September 2, 1969	A-69 551

Date	Proceedings and Orders
	Counsel for petitioner: Joseph H. Sharlitt
	Counsel for respondent:
Jun. 20, 1969	Application for extension of time to file petition for certiorari filed and order granting same. (Warren, C. J., until 9-1-69)
Sept. 2, 1969	Petition for writ of certiorari and record filed.
Sept. 2, 1969	Motion to defer consideration filed.
Sept. 19, 1969	Application for and order extending time to file government's response. (Until 11-3-69)
Oct. 24, 1969	Application (further) for and order further extending time to file response, etc. (time extended pending filing of certiorari to review action of Court of Claims upon motion of July 14, 1969 in that Court)

DOCKET ENTRIES IN THE COURT OF CLAIMS
Since January 14, 1969

* * * * *

Feb. 11, 1969	Order of the Supreme Court, dated January 14, 1969, reversing & remanding this case (and case no. 353-65) filed. Notice to parties.
Feb. 12, 1969	Plaintiff's motion for leave to file first amended petition filed. Copies (2) to deft.
Feb. 21, 1969	Record in re certiorari returned from the Supreme Court.
Feb. 24, 1969	Defendant's opposition to plaintiff's motion to file an amended petition filed. Copies (2) to atty.
Feb. 28, 1969	Plaintiff's motion for leave to file reply to defendant's opposition filed. Copies (2) to deft. ALLOWED Mar. 11, 1969.
Mar. 11, 1969	Plaintiff's reply to defendant's opposition to plaintiff's motion for leave to file amended petition filed. Copies (2) to deft.
Mar. 11, 1969	Defendant's opposition to plaintiff's motion for leave to file a reply to plaintiff's opposition, and in the alternative, for leave to file a response to plaintiff's reply filed. Copies (2) to atty. ALLOWED Mar. 13, 1969.

GENERAL Docket Case No. 357-64 AUGENBLICK

Date	Proceedings Bernhardt
Mar. 13, 1969	Defendant's response to plaintiff's reply to defendant's opposition to plaintiff's motion to file an amended petition filed. Copies (2) to atty.
Mar. 27, 1969	Plaintiff's motion for leave to file reply filed. Copies (2) to deft. ALLOWED Mar. 28, 1969 and filed.
Mar. 28, 1969	Plaintiff's reply brief filed. Copies (2) to deft.
Apr. 4, 1969	Court entered order denying plaintiff's motion for leave to file first amended petition; vacating and withdrawing the judgment entered herein on May 12, 1967 and dismissing plaintiff's petition. Copy to parties.
Jun. 13, 1969	Plaintiff's application pursuant to Rule 71 (request for record in re certiorari) filed. Copies (2) to deft.
Jun. 25, 1969	Plaintiff's withdrawal of application pursuant to Rule 71 filed. Copies (2) to deft.
Jul. 14, 1969	Plaintiff's motion for leave to file second amended petition and for relief under Rule 69(b) filed. Copies (2) to deft.
Jul. 25, 1969	Defendant's motion for extension of time (to August 24, 1969) to file response to plaintiff's motion for leave to file second

	amended petition filed. Copies (2) to atty. ALLOWED Aug. 15, 1969.
Jul. 29, 1969	Defendant's motion for extension of time (to August 24, 1969) to file opposition to motion for relief filed. Copies (2) to atty. ALLOWED Aug. 15, 1969.
Aug. 20, 1969	Plaintiff's petition for stay of the court's order of April 4, 1969, denying plaintiff's motion for leave to file first amended petition filed. Copies (2) to deft.
Aug. 25, 1969	Defendant's opposition to plaintiff's motion for relief under Rule 69(b) filed. Copy to atty.
Aug. 25, 1969	Defendant's opposition to plaintiff's motion to file a second amended petition filed. Copies (2) to atty.
Aug. 27, 1969	Defendant's objection to plaintiff's petition for stay of the court's order filed. Copies (2) to atty.
Aug. 28, 1969	Plaintiff's motion for waiver of Rule 71(a) filed. Copies (2) to deft. ALLOWED Aug. 28, 1969 and filed.
Aug. 28, 1969	Plaintiff's application pursuant to Rule 71. filed. Copies (2) to deft. ALLOWED Aug. 28, 1969.
*	* * * *
Aug. 29, 1969	Record in re certiorari handed to attorney for plaintiff. $5 fee paid.

Sep. 4, 1969	Plaintiff's reply to defendant's opposition to motion to file a second amended petition, etc., filed. Copies (2) to deft.
Sep. 5, 1969	Notice of filing in Supreme Court of a petition for writ of certiorari on September 2, 1969, No. 551, October Term, 1969 filed.
Oct. 31, 1969	Court entered order staying proceedings pending disposition of Supreme Court cases. Copy to parties.
Feb. 25, 1970	Plaintiff's motion for leave to file notice filed. Copies (2) to deft.
Mar. 12, 1970	Defendant's notice to court filed. Copies (2) to atty.
Mar. 4, 1971	Defendant's motion to lift pending stay and/or suspension order, to deny plaintiff's motion for leave to file second amended petition, and to deny relief under Rule 152(b) filed. Copies (2) to atty.
Mar. 22, 1971	Plaintiff's motion for leave to file motion (for time extension, out of time) filed. Copies (2) to deft. ALLOWED Mar. 26, 1971.
Mar. 26, 1971	Plaintiff's motion for extension of time (to April 3, 1971) to response to motion to file stay, etc. filed. Copies (2) to deft. ALLOWED Mar. 26, 1971 with no further extension to be granted except for extraordinary circumstances.

Apr. 5, 1971	Plaintiff's response to motion to lift stay, etc., filed. Copies (2) to deft.
Apr. 14, 1971	Defendant's reply to response to motion to lift stay filed. Copies (2) to atty.
Apr. 22, 1971	Plaintiff's motion for leave to file (response to reply filled April 14, 1971) filed. Copies (2) to deft. ALLOWED Apr. 22, 1971.
Apr. 22, 1971	Plaintiff's response to defendant's reply filed. Copies (2) to deft.
Jun. 2, 1971	Argued and submitted on plaintiff's motion for leave to file 2nd Amended Petition and for relief and defendant's motion to lift stay, to deny motion to file 2nd Amended Petition and to deny relief. A Court order will subsequently be entered providing for further briefing by the parties.
Jun. 14, 1971	Court entered order order providing for further briefing as set forth in the order (60-45-30). Copy to parties.
Aug. 6, 1971	Plaintiff's motion for extension of time (to October 12, 1971) to submit brief in compliance with court's order of June 14, 1971 filed. Copies (2) to deft. ALLOWED Aug. 26, 1971 to September 27, 1971, with no extension to be granted except for illness or similar emergency.
*	* * * *

Aug. 13, 1971	Defendant's opposition to plaintiff's motion to enlarge the time for filing brief filed. Copies (2) to atty.
Sep. 27, 1971	Plaintiff's brief (submitted pursuant to the Order of the Court of June 14, 1971) filed. Copies (25) to deft.
Nov. 11, 1971	Defendant's brief pursuant to court order of June 14, 1971 filed. Copies (4) to atty.
Dec. 13, 1971	Plaintiff's reply brief filed. Copies (4) to deft.
Dec. 17, 1971	Plaintiff's request for oral argument filed. Copies (2) to deft. ALLOWED Mar. 20, 1972 in that this case is to be placed on an appropriate calendar for oral argument.
Apr. 28, 1972	Plaintiff's motion to calendar the case for oral argument filed. Copies (2) to deft. DENIED May 5, 1972, without prejudice to reconsideration by the court at a later time.
Jul. 3, 1973	Plaintiff's motion to calendar case for oral argument filed. Copy to deft. SEE ENTRY of Aug. 17, 1973.
Jul. 13, 1973	Defendant's response to motion filed July 3, 1973 filed. Copies (2) to atty.
Jul. 13, 1973	Plaintiff's motion to supplement motion to calendar case for oral argument filed. Copies (2) to deft.

Jul. 30, 1973	Plaintiff's motion for leave to file reply to defendant's response to motion to calendar case for argument filed. Copies (2) to deft. ALLOWED Aug. 16, 1973.
Aug. 16, 1973	Plaintiff's reply to defendant's response to motion to calendar case for argument filed. Copies (2) to deft.
Aug. 17, 1973	Re motion of July 3, 1973: MOTION GRANTED and case placed on the October, 1973 calendar for oral argument; it is further ordered that each party may file a supplementary brief, provided that such briefs shall be filed not later than September 18, 1973 with no additional time for response or reply to the brief of the adverse party, and provided further that such briefs shall be limited to a discussion of the cases that have been decided and the material developments that have occurred since the former briefs of the parties were filed herein.
Sep. 17, 1973	Defendant's supplementary brief filed. Copies (13) to atty.
Sep. 18, 1973	Plaintiff's supplementary brief filed. Copies (13) to deft.
Sep. 24, 1973	Court entered an order removing case from the October 1973 calendar filed. Copy to parties.

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Oct. 3, 1973	Plaintiff's motion for reconsideration of the court's order of Sep. 24, 1973 filed. Copies (2) to deft.
Oct. 12, 1973	Defendant's response to motion file October 3, 1973 filed. Copies (2) to atty.
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APPENDIX C

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(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. In that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

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